# SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1951**

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## No. 12

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JOSEPH EDWARD MORISSETTE,
*Petitioner,*

*vs.*

THE UNITED STATES OF AMERICA

---

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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## PETITIONER'S BRIEF

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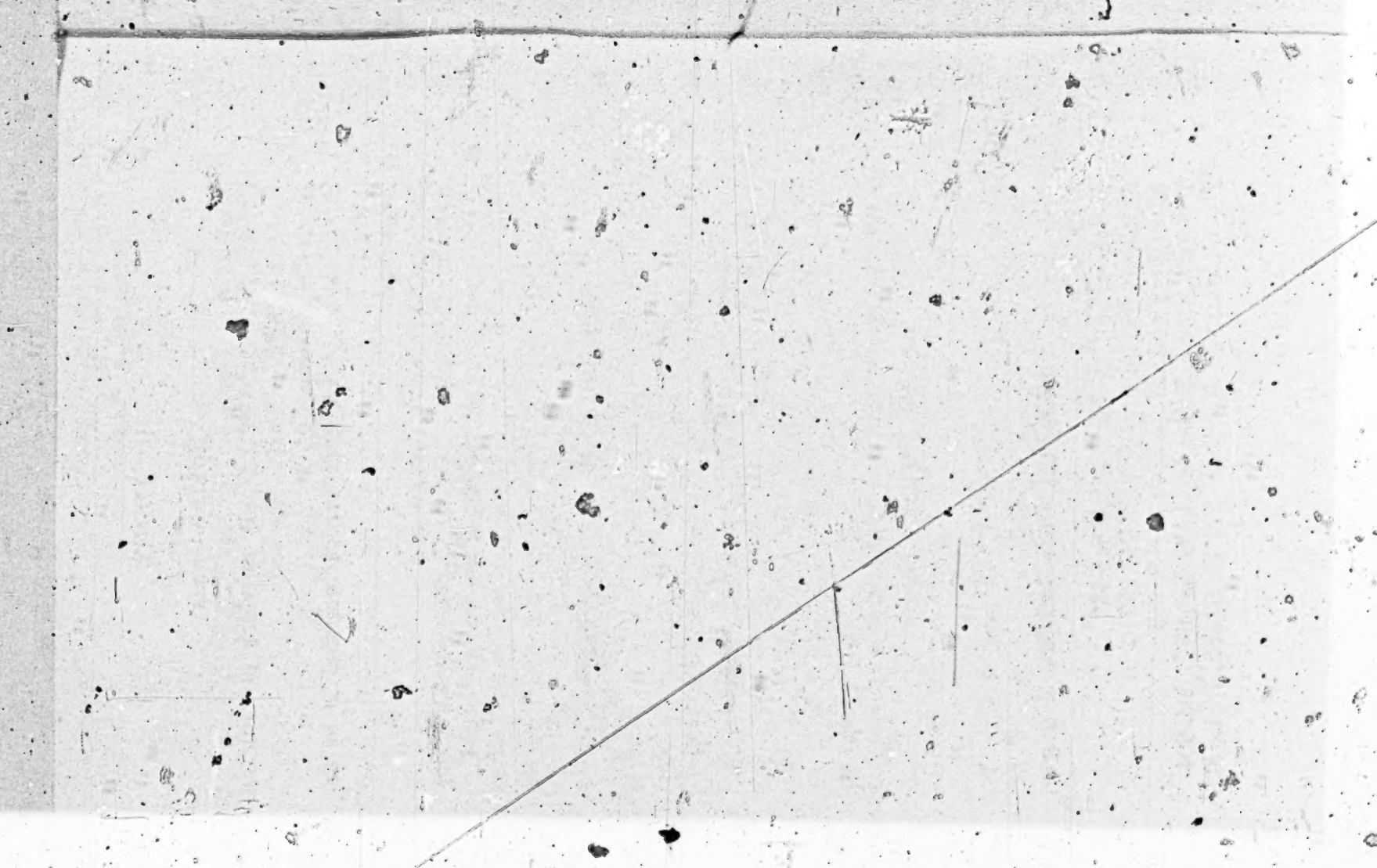

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### Concise Statement of Grounds on Which Jurisdiction of the Supreme Court Is Invoked

Section 1254, Title 28, United States Code. A writ of certiorari was granted on petitioner's application as provided in this section.

### A Concise Statement of the Case

Joseph Edward Morissette was born August 15, 1921 (R. 27). When he was fifteen years old his father died

(R. 27). Shortly after his father passed away he went to the CC Camp because he had no other means of living (R. 27). While he was at the CC Camp his mother died (R. 27). Joe was working at the A. C. Spark Plug Factory when he went in the Army (R. 27). He was honorably discharged from the United States Army in February, 1944, and went back to the A. C. Spark Plug Company to work (R. 27). He left the Spark Plug Company and went into the fruit market business (R. 27). He also hauled Christmas trees from Northern Michigan every year (R. 27) (R. 31). He had been buying junk off and on for three and a half, maybe four, years and went pretty near all over Michigan. He went up through the Thumb, around Port Huron, Bad Axe and up as far as Marquette above the Straits and over in Lansing once in a while. This was generally in the winter months as in the summer months he ran a fruit business (R. 31).

During the summer of 1947 he operated a fruit stand at the Junction of Highway 171 and 23 "the Dixie Highway" (R. 30) (R. 31). This is about a mile north of the City limits of Oscoda. During this summer he also wholesaled fruit to stores and restaurants all the way from Pinconning to Alpena (R. 30) (R. 31). When Joe was nineteen years old he was married and he had one son six years of age (R. 27). He was in the fruit business located at G 5010 North Saginaw Road just outside of the City limits of Flint and was living with his wife and six year old boy in a trailer placed in the back of his uncle's home at 5117 Horton Avenue (R. 27). Joe had been hunting deer in Northern Michigan and on the Oscoda Bombing base for the last three years (R. 31). He had observed old tins (R. 28) and had known previously that the old bomb casings were on the range, but he went there to hunt deer (R. 32). From the appearance of this junk out there in the woods he thought it had been thrown away because it was rotting

(R. 34). It was rusted right out and he thought it had been abandoned (R. 35). The used bomb casings were piled on the edge of the cleared out range (R. 8) about a half mile from the traveled road and twenty-four miles by road of the headquarters of the bombing base (R. 12). This was about twelve miles by air (R. 12). In a heavy wooded section. Just general deer hunting country like the rest of it up there (R. 13).

The pictures, Exhibits one to six, are pictures of spent bomb casings (R. 9). The pictures were taken on the Oscoda base gunnery range in June, 1949 (R. 9) (R. 10) and (R. 4). Exhibit one is a picture close up of the spent bomb casings (R. 9) (R. 10). The bomb casings are piled up to decontaminate the target area (R. 8). They clear all the spent bomb casings off and pile them up (R. 8). They were not salvaged because of possible danger. There is a danger if the black powder has not exploded. When the bomb drops it will in some cases not explode (R. 8) (R. 9). The bomb casings were stacked up there beginning in at least 1944 (R. 13) (R. 14). Captain Askelson, who was the commanding officer at the Oscoda Air Base (R. 7) and had knowledge of the base since 1940 and was stationed at the base since 1944, (R. 13) gave the following information:

Q. So far as you know they have been collecting these things together up there and piling them up since at least 1944?

A. Yes.

Q. And they have been out there and exposed to the weather, are they?

A. Yes.

Q. Are they rusted, the ones we saw?

A. Yes.

Q. They are pretty well rusted out, aren't they?

A. They are rusted, yes.

Q. Some of them so rusted that they are practically decomposed, isn't that right, Captain?

A. I guess so.

Q. And the rest of them are in the process of decomposition?

A. Yes (R. 14).

Exhibit one is a close up of one of the piles from which Joe Morissette took some of the old bomb cases and the ones he took are like the ones that are still there (R. 9) (R. 28) and (R. 29). Exhibit two is a close up picture of what is left of a pile from which he took something and the ones he took looked exactly like the ones that remain there (R. 9) (R. 28). Exhibit three and six are pictures of a pile that Joe didn't see until the pictures were taken (R. 9) (R. 28). Exhibit four is a picture of two piles from another view from which Joe got some of the bomb cases (R. 9) (R. 28). Exhibit five is a picture of two piles that are right close together and Joe took some from each pile. The ones he took are just about like the ones that are left (R. 9) (R. 28).

Joe had a Studebaker, 1948 stake truck (R. 28). Pat Collins, Mr. and Mrs. Cineski and some others went with Joe to Drummond Island to hunt deer in the fall of 1948 (R. 28). He came back and hunted at his brother-in-law's, Marvin Atchison, place for the second week (R. 28) (R. 18). Joe Morissette, Marvin Atchison and Pat Collins were hunting on the Oscoda bomb base (R. 28). The bomb base is very good deer country (R. 28). Pat had got a deer up at Drummond Island (R. 28). When they were hunting they saw these old tins that were expended bombs (R. 28). Joe did not get a deer so he decided to make his hunting trip pay by loading up his truck with these old bomb casings (R. 22). Marvin Atchison, his brother-in-law, helped him load about three tons of the bomb casings onto his truck (R. 28). It was in broad daylight when he took them out

of there about one or two o'clock in the afternoon. About eight or ten people passed through there while they were taking them. A couple of cars drove by and a coupe stopped and talked (R. 29). There were deer hunters came past them while they were getting these things. Marvin Atchison remembered that three cars stopped while they were loading them (R. 18) (R. 19). They took them out to Alger Anderson's farm, that is Marvin's uncle, and unloaded the bomb casings there (R. 22). They drove the truck through Mikado, got gas, and drove over to the farm (R. 19). At another place they stopped at one of their neighbors who had some scrap iron to sell and Joe bought that. They took it over to the farm and unloaded it right in the field in plain sight, about ten rods from the road. You could see it from the road in plain sight. It lay out there close to a week. Marvin Atchison took the tractor and backed over it for Joe to smash it down so that he could load it with other stuff he got and make it more compact (R. 19) (R. 29). The old bomb cases were left in plain view of the road until they finished up deer hunting and when they had some spare time they took the tractor and run over it (R. 29). This was so that Joe could get on some of his other junk, some of his steel and stuff (R. 29). Joe hired a couple of kids to help him load the truck (R. 29). Pat Collins had stored his deer at the plant locker over by the air base (R. 29). Joe got loaded up (R. 29) and started out from the farm about one-thirty or two o'clock in the afternoon (R. 34). He went over to the locker and got the deer (R. 29) and put the deer on the cab of the truck (R. 33). Joe had put the steel on the bottom of the truck (R. 32). Then he put three tons of the old bomb casings on top, out in plain sight so everybody could see them (R. 32). He didn't put anything over the bomb cases to hold them in the rack (R. 33). He drove from the locker down 171 in broad daylight right in the after-

noon. He had an army stake body on his truck, open, and these old bomb casings were right in plain view (R. 29). At the junction of 171 and Highway 23 John V. Wagner, who lives at Oscoda and got acquainted with Joe Morissette when he operated a fruit stand at the junction of 171 and 23, (R. 16) came by in his truck and flagged Joe down. Joe stopped and Wagner came back and talked to him (R. 30). He told Joe that he had some scrap at his place that he wanted him to sell and wanted Joe to pick it up (R. 30). Joe told him he couldn't take it then, but would come back and maybe take it back on the next load (R. 30). Wagner asked what he had on and Joe told him some old bomb casings. Joe talked to Wagner five or ten minutes (R. 30). While Joe was stopped there Leo Edward May, who lives at Oscoda and is seventeen years of age and had seen the bomb casings out on the bombing range, saw them on the red Studebaker truck at the junction of 171 and U. S. 23 (R. 5). In the scrap drive for the Department of Commerce and Agriculture Leo May had tried to get these old bomb casings and couldn't get them and wondered how anybody else could get them when they couldn't. When he saw them they were on the red Studebaker truck. It was parked off on the side of the road and there Joe was talking to a man (R. 5). Leo was on the school bus going home and he went home and told his father. After talking to Mr. Wagner Joe Morissette drove on down the Dixie Highway (R. 30) and next stopped to get a sandwich (R. 30). He parked his truck right there on the highway up in front of the restaurant in broad daylight. He made no effort to conceal anything. He didn't think there was any reason for him to conceal anything (R. 30). This was on the 2nd of December, 1948 (R. 42). He took about seven ton of other stuff and three ton of that there stuff (R. 31) and took it to Joe Laro's Coal and Iron Company at 6301 North Dort Highway in Flint, Michi-

gan. He was paid about Eighty-five ($85.00) Dollars for his load (R. 22) (R. 23). He knew the bomb casings were at one time United States Government property, but he did not know if they were when he took them and he did not know that these bomb casings were not to be removed from where they were (R. 23).

A little while after he sold the load he was up north to Cheboygan and bought some Christmas trees and the State Police stopped him. This was on December 10, 1948, south of Tawas City on U. S. 23 (R. 20). The State Policeman, Howard Smith (R. 19) told of stopping Mr. Morissette. The State Policeman said I believe we asked him for his operator's license first and asked him if he would come back in the patrol car so we could talk to him. The State Policeman said that Mr. Morissette did this readily and answered all his questions frankly and freely, without any hesitation on his part. The State Policeman said he asked Joe Morissette if he had taken some bomb casings from the air base and that Joe Morissette told him that he had and had taken them to Flint where he had sold them for Twenty-eight ($28.00) Dollars a ton and that Joe told him he had a little over three ton on the truck as he remembered it. The State Policeman asked him if he had permission to take them and Joe said he didn't, that Joe told him that he didn't think the old bomb casings were any good and didn't think anybody would care if they were hauled away (R. 20).

A little later on Joe Morissette heard the FBI man wanted to see him and he went down the next day after he knew the FBI man wanted to see him (R. 31). Joe Morissette went to the FBI office at Flint, Michigan, and the FBI agent was busy on another matter so about half an hour later Mr. Morissette went back again (R. 21). Mr. Morissette furnished the FBI with a statement and signed it (R. 21) (R. 22) (R. 23). In this statement Joe Morissette stated

that he had known about the bomb casings previously, but that he went to the bomb range to hunt deer (R. 22) and he said he knew the bomb cases were one time United States Government property, but he did not know if they were when he took them and he said that he did not know that the bomb casings were not to be removed from where they were (R. 23). This statement was made on January 20, 1949 (R. 23).

On May 12, 1949, an indictment was returned by the Grand Jury (R. 3). The Grand Jury charges:

> "That on or about the 2nd day of December, A. D., 1948, at Oscoda, Michigan, in the Eastern District of Michigan, Northern Division, Joseph Edward Morissette, did unlawfully, wilfully and knowingly steal and convert to his own use about three tons of used bomb casings having a value of approximately $84.00, and being the property of the United States of America, located at the bombing range of the Oscoda Army Air Base, in violation of Section 641, United States Code, Title 18.
>
> A true bill.
>
> Alfred Grueber, Foreman.
>
> Edward T. Kane, United States Attorney, by Janet E. Kinnane, Assistant U. S. Attorney." (R. 3).

Trial was had before the Honorable Frank A. Picard, District Judge, at Bay City, Michigan, on June 13, and 14, 1949 (R. 4). Motion was made to quash the indictment because it did not charge felonious intent and the Court said he would go ahead and hold it in abeyance and if the government doesn't produce any authority tomorrow morning the case will be dismissed (R. 5). The Court gave counsel fifteen minutes a side to argue to the jury and excused the jury for the purpose of telling counsel what they could argue on and what they couldn't argue on (R. 41). The Court said that he did not believe the defendant's request

to charge (R. 50) was the law and that he was not going to permit defendant's counsel to argue this to the jury that this man can go on somebody else's property, take property, and then go away and say, "I thought they abandoned it.", (R. 42). The trial court said he took it because he thought it was abandoned and he knew he was on governn ent property. His counsel said, "That is it exactly, Judge. He took it because he thought it was abandoned." (R. 43). The Court said, "That is no defense. I won't permit you to argue it to the jury and if I am wrong I am wrong, if that is the law of the United States." (R. 44). At this time the counsel said, "That if Joe Morissette, when he picked those things up, thought nobody wanted them, it would be like junk that would be alongside the road. It is the state of his mind at the time. You have to have a state of mind to be a thief." (R. 44). The Court said, "The state of his mind was to take something that didn't belong to him, and there is the intent. If I am wrong, I am wrong (R. 44). I will not permit you to show this man thought it was abandoned. If that is the law I want a higher court than I am to say so." (R. 44).

The trial court, in its charge to the jury, said: "The defense that they sought to introduce here was that he thought it was abandoned property. And I instruct you that there are some instances where a person can take property that appears to be abandoned, and take it and really be guilty of no criminal offense. And this court permitted all the testimony to go in. But when it comes to the time of instructing the jury, I must instruct you that in this case there is no evidence of abandoned property. Abandoned means absolute relinquishment, including both the intent to abandon, and the external act by which the intention is carried into effect. And when the evidence is such as to raise the issue, abandonment is a question for the jury.

But ladies and gentlemen, I hold in this case that there is no question of abandoned property. In the first place, this man knew that he was on government property. He knew it was the bombing range. Whether he knew it or not is immaterial. The bomb shells were on somebody's property and they didn't belong to him. In every crime there must be an intent to do the thing that the person does. For example, if you walk away with a thousand dollars in your pocket that you don't know is there, you hadn't intended to steal that thousand dollars at all. There is no intent. But the question is here. Did he intend to take the property? And I instruct you that if you believe the testimony of the government in this case, he intended to take it. And I further instruct you that if you believe his testimony, he intended to take it. (R. 47) * * * He had no right to take this property. He had no right, and it is no defense to claim that it was abandoned, because if was on private property (R. 48). Now, there are cases of abandonment, for example, where sometimes you see an old automobile along the road that somebody has left there, and by the time the vandals get through there isn't very much left, and somebody comes along later on and decides to take a part of that property. It has been left there in the road, in the highway. But if I were to hold according to the theory of the defendant here, that a man can walk on anybody else's farm, or anybody else's property, and pick up something, and do it in the open, and then sell it, and say, 'I thought it was abandoned property and, therefore, I am not guilty,' it would be a most unusual law. That is not the law as I understand it. You may feel the government is to be criticized for leaving that property out there. I don't know whether it should be or not. The government, especially the Armed Forces, do a lot of things in leaving their property out, that you and I don't approve of, but

how do we know what the government intended to do up there? Three thousand pounds of it was sold at somewhere near Eighty-four ($84.00) Dollars. They might have been wating for it to get in such quantity that they could send a freight car up there and take it and sell it, because it might become very valuable. At one time during the last war that kind of junk was valuable. We don't know what may be in the minds of the military officials, and for any man to go up there and take the property, he is committing a wrong under this section of the act. I don't think that this calls for any extended further instruction to this jury. You have taken an oath to follow the law as given by this court. Ordinarily there is a question of fact for the jury. I don't think there is any question of fact for the jury, except whether you believe one story or the other. You can go up there and come down and say not guilty. You can do that because you are the judges of the facts. But if you follow the instruction of the court, you have got to believe one story or the other, or it is up to you to believe one story or the other. And I instruct you to this effect: That if this young man took this property (and he says he did), without any permission (he says he did), that was on the property of the United States Government (he says it was), that it was of the value of one cent or more (and evidently it was), that he is guilty of the offense charged here. If you believe the government, he is guilty." (R. 49).

The court wanted to know if there were any exceptions to the charge (R. 49). Then defendant's counsel said:

Mr. Transue: Exception, of course.

The Court: Your exception is I should submit to the jury the question of abandonment?

Mr. Transue: Not only the question of abandonment, but also the condition of his mind and the intent that he had at the time that this was removed; that there must have been

a felonious intent in his mind to take it away and not be just a trespass.

The Court: Well, all right. The question on intent is whether or not he intended to take the property. He says he did. Therefore, if you believe either side, he is guilty (R. 49).

This was all in the presence of the jury (R. 49). The jury retired.

The Court: Now you may enter the objection.

Mr. Transue: The objection is this, as I understand the court's charge, that the taking is the intent.

The Court: No. I leave the question to them whether he intended to take it. He says he did.

Mr. Transue: But the taking must have been with a felonious intent.

The Court: That is presumed by his own act.

Mr. Transue: That is my exception.

The Court: All right.

Mr. Transue: That the felonious taking cannot be derived just from the taking.

The Court: All right, overruled.

Defendant and petitioner made the following request to charge:

1. "The defendant took the property and sold it. There is no question about that.

The question is: What was in Mr. Morissette's mind at the time he took it? Unless you find beyond a reasonable doubt that at the time defendant took the property he had a felonious intent, knowledge that his act was wrong, he is not guilty.

Therefore, if Mr. Morissette believed the government had thrown away or abandoned this property, you will find him not guilty, even if he was mistaken in his belief.

2. If the taking was open and notorious and there was no subsequent attempt to conceal the property, and no denial, but an avowal of the taking, a strong presumption arises that there was no felonious intent, which presumption must be repelled by clear and convincing evidence, before a conviction is authorized'' (R. 50).

The verdict was guilty of the charge in said indictment contained (R. 51). The judgment and commitment sets forth:

"The defendant having been convicted on verdict of guilty of the offense charged in the Indictment in the above entitled cause, to-wit: Theft of Government Property'' (R. 52).

Motion was made for a new trial. This was denied (R. 53). The trial court's opinion in regard to a new trial was not included in the record, but was included in the petition for writ of certiorari and the trial court, in its opinion, said: "Stealing itself presumes a criminal intent and there is no expressed requirement of intent in the statutory offense'' (Page 22 of the petition for writ of certiorari).

**Specification of Assigned Errors Intended to Be Urged**

1. Is a felonious intent a necessary element of the crime charged against the defendant under the foregoing statute, Section 641, Title 18, United States Code.

2. Should the defendant's requested instructions on abandonment been given to the jury by the trial court.

3. Should defendant's requested instruction to the effect that the taking was open and notorious, showing an absence of felonious intent have been given.

4. Did the trial court direct a verdict of guilty and if it is not a direct verdict of guilty, is it so argumentative and biased as to constitute reversible error and did the trial court so far depart from the accepted and usual course of

judicial proceedings as to deny the defendant a trial by jury and due process of law as provided by the United States Constitution.

## ARGUMENT

### Summary

The defendant contends that he did not have a felonious intent, guilty knowledge, evil state of mind or will to do a wrong against society when he loaded up the rusted old bomb casings and took them from the bombing range. He contends that he thought they were abandoned, that their appearance of being rusted and rotted out was evidence from which he thought they had been abandoned (R. 35). He contends that when the commanding officer of the air base admitted that they had laid in piles for at least four years and were pretty well rusted out so that they were practically decomposed and that the rest of them were in the process of decomposition and that he had never obtained any authority to do anything else with them (R. 8) that this, together with their location twenty-four miles out in the deep woods (R. 6) just general deer country (R. 13), was evidence that the government had, in fact, abandoned them and thrown them away (R. 14). He contends that there was a question for the jury on the issue of abandonment and in his belief that they, the old bomb casings, had been abandoned. He contends that his taking them in the open when other deer hunters were going past in broad daylight and talking to them while he was loading them up, transporting them in broad daylight to a Village, then to another farm and then to his wife's uncle's farm and putting them in the field in view of the road, smashing them down with a tractor, loading them again with other junk and taking them in broad daylight down the Dixie Highway, stopping to eat and parking as

well as talking to a man who stopped him, telling the State Police about it when he was asked freely and fully and to the FBI, shows that he had an absence of any evil intent or feeling of having wronged society and the instruction requested to show that his actions along this line raised a strong presumption that there was no felonious intent and that such a presumption had to be repelled by clear and convincing evidence before the jury could convict, should have been given. He contends that felonious intent is an ingredient of the crime charged in the indictment against him and denounced by the statute Section 641 of Title 18, United States Code, under which it was founded. He further contends that regardless of the meaning of the words of the statute and in the indictment "knowingly converts to his own use" that he is charged with stealing, was convicted of stealing and theft and that felonious intent is involved in stealing as charged in the indictment and that it was a question for the jury with proper instruction, his contention in this regard being that the verdict against him was a general one and it follows that instead of it being permissible to hold as did the Circuit Court of Appeals, as shown by the majority opinion, that the verdict could be sustained if any one of the clauses of the statute were found not to require felonious intent as an element of the crime charged and he contends that the necessary conclusion from the manner in which the case was sent to the jury and the verdict received is that if any of the clauses of the statute and indictment require a felonious intent the conviction can not be upheld under the federal constitution. He further contends that the Circuit Court of Appeals is in error, as shown by the majority opinion in the holding of that Court, that felonious intent is not an ingredient of the crime charged (R. 64). And that the Circuit Court of

Appeals is further in error in holding that "the conversion to his use and selling of the bomb casings without authority were, as appears from the record, knowingly done by the appellant" (R. 66). And that the Circuit Court of Appeals is in error in holding that the indictment and statute do not require proof of a felonious intent (R. 66). And that the Circuit Court of Appeals is in error in holding that "the purpose of Congress in enacting Section 641 was to afford added protection against the taking of government property" (R. 67). And that the Circuit Court of Appeals is further in error in holding that "the word or as used in the statute evinces that purpose" (R. 67). And that the Circuit Court of Appeals is in error in holding that "if it had been intended to require knowing conversion to fall within the same category with embezzling, stealing or purloining the word and would have been used in the statute" (R. 67). And that the Circuit Court of Appeals is further in error in holding that "the phrase knowingly converts to his own use or the use of another would be surplusage if placed in the same category with embezzlement, stealing and purloining" (R. 67). And that the Circuit Court of Appeals in error in holding that scienter is not an essential ingredient of the crime charged in the indictment" (R. 68). And that the said Circuit Court of Appeals is further in error in holding that there was no evidence of abandonment and belief of abandonment to make a jury question of this issue (R. 69). And that the Circuit Court of Appeals is further in error in holding with the trial court that the defendant could be convicted without submitting to the jury the question of whether there was a criminal intent in the defendant's mind (R. 70). And that the Circuit Court of Appeals was further in error in sustaining the conviction pursuant to rule 52A of the Federal Rules of Criminal Procedure (R. 70).

**1. A felonious intent is a necessary ingredient of the crime charged.**

The crime charged is founded under Section 641 of Title 18, United States Code. It provides:

> "Whoever embezzles, steals, purloins, or knowingly converts to his use or the use of another, or without authority, sells, conveys or disposes of any record, voucher, money, or thing of value of the United States or of any department or agency thereof, or any property made or being made under contract for the United States or any department or agency thereof; or
>
> Whoever receives, conceals, or retains the same with intent to convert it to his use or gain, knowing it to have been embezzled, stolen, purloined or converted—
>
> Shall be fined not more than $10,000 or imprisoned not more than ten years, or both; but if the value of such property does not exceed the sum of $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both.
>
> The word 'value' means face, par, or market value, or cost price, either wholesale or retail, whichever is greater."

This statute is a consolidation of Sections 82, 87, 100 and 101 of Title 18, United States Code, 1940 edition. These Sections provide:

Section 82 of United States Code Annotated, 1940 Edition, is as follows:

> "Whoever shall take and carry away or take for his own use, or for the use of another, with intent to steal or purloin, any personal property of the United States, or any branch or department thereof, or any corporation in which the United States of America is a stockholder, shall be fined not more than $10,000 or imprisoned not more than ten years, or both."

Section 87 of United States Code Annotated, 1940 Edition, is as follows:

> "Whoever shall steal, embezzle, or knowingly apply to his own use, or unlawfully sell, convey, or dispose of, any ordnance, arms, ammunition, clothing, subsistence, stores, money, or other property of the United States, furnished or to be used for the military or naval service, shall be punished as prescribed in sections 80 and 82 to 86 of this title."

Section 100 of United States Code Annotated, 1940 Edition, is as follows:

> "Whoever shall embezzle, steal, or purloin any money, property, record, voucher, or valuable thing whatever, of the moneys, goods, chattels, records, or property of the United States, shall be fined not more than $5,000 or imprisoned not more than five years, or both."

Section 101 of United States Code Annotated, 1940 Edition, is as follows:

> "Whoever shall receive, conceal, or aid in concealing, or shall have or retain in his possession with intent to convert to his own use or gain, any money, property, record, voucher, or valuable thing whatever, of the moneys, goods, chattels, records, or property of the United States, which has theretofore been embezzled, stolen, or purloined by any other person, knowing the same to have been so embezzled, stolen, or purloined, shall be fined not more than $5,000, or imprisoned not more than five years, or both; and such person may be tried either before or after the conviction of the principal offender."

Section 87 provides, "whoever shall steal, embezzle or knowingly apply to his own use." This is the same thing

as is meant by the words in Section 641 which state, "whoever embezzles, steals, or knowingly converts to his own use."

The case of *Adolfson* v. *United States,* 159 Federal 2nd, 883, (C.A. 9) is cited in the majority opinion in support of the proposition that scienter, felonious intent are not an element of the crime "knowingly converts to his use." The *Adolfson* case holds just the opposite and I quote Honorable Homer T. Bone, who wrote the opinion in that case and said on page 888:

> "These conversations, admitted in evidence, together with the written confession of appellant, when considered in connection with the rest of the evidence and testimony in the case, clearly support an inference of 'guilty knowledge' on the part of appellant, i.e., that he did 'knowingly apply to his own use' property of the United States; that while so doing he knew the property was stolen."

And the Court further said:

> "The 'guilty knowledge,' if it existed, necessarily had to be and could be shown by all the surrounding facts and circumstances. To establish this claimed guilty knowledge as a relevant and material fact, the prosecution introduced evidence showing appellant's acts and statements at the time of the purchase, which it claimed revealed a clear intention and purpose to accomplish the unlawful acts charged in the indictment. We regard this evidence as relevant and competent for the purpose of showing the charged 'guilty knowledge' as a fact. This because the existence of this 'knowledge' of the character and value of the property was a material and necessary element in the prosecution's chain of evidence, and it was therefore proper to submit it to the jury on the question of whether or not this guilty knowledge existed and was proved beyond a reasonable doubt."

From the foregoing by the case cited by the Circuit Court of Appeals in this case in support of its opinion it appears that guilty knowledge was an element of the crime there charged. To "knowingly apply to his own use" and it would appear that this case is clear authority that guilty knowledge is required and is a jury question in the case at bar, as the section 641 uses the words "or knowingly converts" and the indictment charges "did unlawfully, wilfully and knowingly convert" and it appears clear that to knowingly convert and knowingly apply are the same thing. The dissenting opinion of the Honorable Thomas McAllister, Circuit Judge, in this case holds that felonious intent is an ingredient of the crime charged and a jury question with proper instruction, that scienter is an element of the statutory crime charged in the indictment.

The majority opinion of the Circuit Court of Appeals refers to the case of *United States* v. *Balint*, 258 U. S. 250, 66 Law Edition, 604 in support of the holding of the Circuit Court of Appeals that scienter, guilty knowledge, felonious intent is not an element of the crime charged in this case and that Congress, by an act to revise, codify, and enact into positive law, Title 18 of the United States Code and by Section 641, created a new crime which did not require scienter or felonious intent as an element. Chief Justice Taft, speaking for the court in the opinion in the *Balint* case said:

> "It is a question of legislative intent, to be construed by the Court."

The court went on to say:

> "Many instances of this are to be found in regulatory measures in the exercise of what is called the police power, where the emphasis of the statute is evidently upon achievement some social betterment rather than the punishment of the crimes, as in cases of mala in se."

The court further said:

> "Congress weighed the possible injustice of subjecting an innocent seller to a penalty against the evil of exposing innocent purchasers to danger from the drug, and concluded that the latter was the result preferably to be avoided. Doubtless considerations as to the opportunity of the seller to find out the fact, and the difficulty of proof of knowledge, contributed to this conclusion."

The work on revision of Title 18, United States Code, entitled Crimes and Criminal Procedure commenced in 1943. (See statement of Honorable Eugene J. Keogh, member of Congress, made December 6, 1944, at a hearing before the house committee on revision of laws on H. R. 5450.) Mr. William W. Barron, chief revisor, said at the same hearing in answer to the following question found on page 2672 of Title 18, United States Code, Congressional Service:

The Chairman. Just to get back briefly to the question of substantial changes in existing law contained in this bill: Am I correct in my understanding that the reviser's notes will set forth clearly what the substantive changes are?

Mr. Barron. Yes.

The Chairman. So that any member of the House or any other interested person, looking at that, can take these notes and determine quickly what the changes have been?

Mr. Barron. In the great majority of cases you will find that only minor changes of phraseology were made. Every substantive change, no matter how minor, is fully explained so that if you in your discretion see fit to make these notes part of your report, they will adequately serve to interpret every proposed change.

At the hearing before the Subcommittee No. 1 of the House Judiciary Committee on H. R. 1600, March 7, 1947.

(H. R. 3190 was substituted for H. R. 1600 on which hearings were held.) See report to accompany H. R. 3190, page 1, Chairman Robsion stated that the bill did not change the law or the meaning of the law, page 2689, Title 18, United States Code, Congressional Service. At the same hearing and on page 2696 of the United States Code, Congressional Service, the following is found:

Mr. Chadwick. Mr. Keogh, I gathered from the very able presentation of the background of your approach that it is probably undesirable at this time for us to consider changes of the substantive laws that either are or might become controversial. This is not the time for that particular type of contribution. Am I correct?

Mr. Keogh. You are correct. But may I take an opportunity to explain my answer a little bit?

The motivation for our seeking to avoid as far as possible controversial substantive changes was due to the basic potential conflict of the jurisdiction of the Committee on Revision of the Laws and the House Judiciary Committee. I think to a large extent, by the merger of our functions into you, that that conflict is somewhat removed.

But, further, we proceeded upon the hypothesis that since that was primarily a restatement of existing law, we should not endanger its accomplishment by the inclusion in the work of any highly controversial changes in law.

Mr. Robsion. And this bill does not include controversial matters?

Mr. Keogh. We have sought to avoid as far as possible, Mr. Chairman, any substantive changes that did not meet with unanimity of opinion.

In the statement of William W. Barron, Chief Revisor for the West Publishing Company, on page 2709 stated:

"These bills simplify and clarify existing laws."

and on page 2710:

> "The Advisory Committee, the Committee of the Judicial Conference on the Revision of the United States Code, the revision staff and all persons concerned in this work, have exercised extreme care to avoid any changes of substantive law, concerning which there might be any controversy."
>
> "All of the judges and lawyers who worked on this revision had but the one idea in mind, to present to your body the best possible restatement of the statutory law."

And in the statement of Robert F. Klepinger, Attorney, Washington, D. C., who worked with the staff to assist in the revision, stated under reasons for enactment:

> "5. The original intent of Congress is preserved. This is because Federal decisions were followed which settled any doubt and, in addition, a uniform style of statutory expression was adopted.
>
> "6. All offenses are defined simply, thus avoiding repetitions. The only changes of any substance in the criminal statutes are those which harmonize and make uniform the punishments for felonies and misdemeanors in the interest of justice."

This is found on page 2725 of the same document.

And in a statement by Charles J. Zinn, Law Revision Counsel, Committee on the Judiciary at pages 2726 and 2727 he said:

> "In the work of revision, principally codification, as we have done here, keeping revision to a minimum, I believe the rule of statutory construction is that a mere change of wording will not effect a change in meaning unless a clear intent to change the meaning is evidenced.
>
> "To find out the intent, I think the courts would go to the report of the committee on the bills and these

reports are most comprehensive. We have incorporated in them Mr. Barron's notes to each section of the bills, both the criminal code and the judicial code.

"It is clearly indicated in each of those revisers' notes whether any change was intended so that merely because we have changed the language—we have changed the language to get a uniform style, to avoid awkward expression, to state a thing more concisely and succinctly—but a mere change in language will not be interpreted as an intent to change the law unless there is some other clear evidence of an intent to change the law. So on that basis, I believe many fears may be allayed. People who are afraid that we are changing the law to a great extent need not worry particularly about it."

The Honorable John M. Robsion introduced H. R. 3190 in the House of Representatives on April 2, 1947. It was considered on May 12, 1947, and Congressman Robsion said in his statement on page 5181 of the Congressional Record:

"This bill is a restatement of the Federal laws relating to crimes and criminal procedure in effect on April 15, 1947."

He further said:

"The law is restated in simple, clear, and concise language."

Mr. Robsion indicated the only changes were because the Philippine Islands was no longer a part of the United States and in regard to the penalties and to consolidate similar statutes.

The Honorable Earl C. Michener, Chairman of the Committee on Judiciary, said at page 5182 of the Congressional Record:

"Where there is any indication of change every one of these questions is fully explained in the report."

On June 18, 1948, the United States Senate proceeded to consider H. R. 3190. The proceedings are shown at page 8906 of the Congressional Record for June 18, 1948. Senator Wiley stated:

"The original intent of Congress is preserved."

The report from the Committee on Judiciary, House of Representatives, to accompany H. R. 3190, sets forth at page 8:

"In many instances similar sections were consolidated without making fundamental changes in the offenses involved. This was true especially in the case of sections brought into the revision from titles 7, Agriculture; 12, Banks and Banking; and 15, Commerce and Trade.

"Good examples of such consolidations will be found in the chapter Embezzlement and Theft. There, in one instance, 11 sections were consolidated into 1, resulting in a tremendous saving of space and notable improvement in style and substance."

On page 9 the following is found:

"The reviser's notes are keyed to sections of this bill and explain in detail every change made in text."

The reviser's notes in regard to Section 641, found at page A54, are as follows:

"Based on title 18 U.S.C., 1940 ed., §§ 82, 87, 100, 101 (Mar. 4, 1909, ch. 321, §§ 35, 36, 47, 48, 35 Stat. 1095, 1096-1098; Oct. 23, 1918, ch. 194, 40 Stat. 1015; June 18, 1934, ch. 587, 48 Stat. 996; Apr. 4, 1938, ch. 69, 52 Stat. 197; Nov. 22, 1943, ch. 302, 57 Stat. 591). Section consolidates sections 82, 87, 100, and 101 of Title 18 U.S.C., 1940 ed. Changes necessary to effect the consolidation were made. Words "or shall willfully injure or commit any depredation against" were

taken from said section 82 so as to confine it to embezzlement or theft.

The quoted language, rephrased in the present tense, appears in section 1361 of this title.

Words "in a jail" which followed "imprisonment" and preceded "for not more than one year" in said section 82, were omitted. (See reviser's note under section 1 of this title).

Language relating to receiving stolen property is from said section 101.

Words "or aid in concealing" were omitted as unnecessary in view of definitive section 2 of this title.

Procedural language at end of said section 101 "and such person may be tried either before or after the conviction of the principal offender" was transferred to and rephrased in section 3435 of this title.

Words "or any corporation in which the United States of America is a stockholder" in said section 82 were omitted as unnecessary in view of definition of "agency" in section 6 of this title.

The provisions for fine of not more than $1,000 or imprisonment of not more than 1 year for an offense involving $100 or less and for fine of not more than $10,000 or imprisonment of not more than 10 years, or both, for an offense involving a greater amount were written into this section as more in conformity with the later congressional policy expressed in sections 82 and 87 of title 18, U.S.C., 1940 ed., than the nongraduated penalties of sections 100 and 101 of said title 18.

Since the purchasing power of the dollar is less than it was when $50 was the figure which determined whether larceny was petit larceny or grand larceny, the sum $100 was substituted as more consistent with modern values.

The meaning of "value" in the last paragraph of the revised section is written to conform with that provided in section 2314 of this title by inserting the words "face, par, or."

This section incorporates the recommendation of Paul W. Hyatt, president, board of commissioners of

the Idaho State Bar Association, that sections 82 and 100 of Title 18, U.S.C., 1940 ed., be combined and simplified.

Also, with respect to section 101 of title 18, U.S.C., 1940 ed., this section meets the suggestion of P. F. Herrick, United States Attorney for Puerto Rico, that the punishment provision of said section be amended to make the offense a misdemeanor where the amount involved is $50 or less.

Changes were made in phraseology."

It would appear from the statements made by everyone who worked on the codification and revision from 1943 on and from the committee report and from the presentation of the bill to the House and Senate that no drastic change of substantive law was made and certainly none such as claimed by the Circuit Court of Appeals in the decision of this case. The following authority is cited to show that no such change was made.

"It will not be inferred that the Legislature, in revising and consolidating the laws, intended to change their policy, unless such intention be clearly expressed." United States v. Ryder, 4 S. Ct. 196, 201, 110 U.S. 729, 740, 28 L. Ed. 308, 312, citing McDonald v. Hovey, 110 U.S. 619, 4 S. Ct. 142, 146, 28 L. Ed. 269 which sums up the rules for the construction of a revision as follows:

So upon a revision of statutes, a different interpretation is not to be given to them without some substantial change of phraseology—some change other than what may have been necessary to abbreviate the form of the law. Sedg. Stat. Const., 365. As said by the New York Court for the Correction of Errors, in Taylor v. Delancy, 2 Cai. Cas., 150: "Where the law antecedently to the revision was settled, either by clear expressions in the statutes, or adjudications on them, the mere change of phraseology shall not be deemed or construed a change of the law, unless such phraseology evidently purports an intention in the

Legislature to work a change." And see, Yates' Case, 4 Johns., 359; Theriat v. Hart, 2 Hill, 380; Parmelee v. Thompson, 7 Hill, 77; Goodell v. Jackson, 20 Johns., 722; Croswell v. Crane, 7 Barb., 191. "The construction will not be changed by such alterations as are merely designed to render the provisions more precise." Moores v. Bunker, 29 N.H., 420. So the Supreme Court of Alabama has held that the Legislature of that State in adopting the Code, must be presumed to have known the judicial construction which had been placed on the former statutes; and therefore the re-enactment in the Code of provisions substantially the same as those contained in a former statute is a legislative adoption of their known judicial construction. Duramus v. Harrison, 26 Ala., 326. "A change of phraseology in a revision will not be regarded as altering the law where it had been well settled by plain language in the statutes, or by judicial construction thereof, unless it is clear that such was the intent." Sedg. Const., 2d ed., 229,. Of course, a change of phraseology which necessitates a change of construction will be deemed as intended to make a change in the law. Young v. Dake, 5 N.Y., 463."

This rule has been reaffirmed by the Supreme Court of the United States in numerous cases. See *Anderson* v. *Pacific Coast S. S. Co.*, 32 S. Ct. 626, 630, 225 U.S. 187, 56 L. Ed. 1047, in which the Court said:

"For it will not be inferred that Congress, in revising and consolidating the laws, intended to change their effect, unless such intention is clearly expressed. United States v. Ryder, 110 U. S. 729, 740, 28 L. Ed. 308, 312, 4 Sup. Ct. Rep. 196; United States v. LeBris, 121 U. S. 278, 280, 30 L. Ed. 946, 7 Sup. Ct. Rep. 849; Logan v. United States, 144 U. S. v. Mason, 218 U. S. 518, 525, 54 L. Ed. 1133, 1136, 31 Sup. Ct. Rep. 28."

In *Hale* v. *Iowa State Board of Assessment and Review*, 58 S. C. 102, 104, 302 U. S. 95, 102, 82 L. Ed. 72, Cardozo, J., writing for the court and construing the Iowa Code said:

"There can be little doubt that the meaning remains what it was before. United States v. Ryder, 110 U. S. 729, 740, 4 S. Ct. 196, 28 L. Ed. 308; United States v. Sischo, 262 U. S. 165, 168, 169, 43 S. Ct. 511, 512, 67 L. Ed. 925; Warner v. Goltra, 293 U. S. 155, 161, 55 S. Ct. 46, 49, 79 L. Ed. 254; Davis v. Davis, 75 N. Y. 221, 225, 226; Fifth Avenue Bldg. Co. v. Kernochan, 221 N. Y. 370, 375, 117 N. E. 579; Mitchell v. Simpson, L. R. 25 Q. D. 183, 189."

In *United States* v. *Sischo*, 43 S. Ct. 511, 512, 26 U. S. 167, 169, 67 L. Ed. 925, reversing 270 Fed. 958 which affirmed 262 Fed. 1001, Holmes J. writing for the court noted that the Revised Statutes of 1878 was primarily a codification of general statutes not lightly to be read as making a change, although of course it may do so.

The verdict in this case was a general verdict and convicted the defendant of everything that is well charged in the indictment. The indictment charged that the defendant did "unlawfully, willfully and knowingly steal" (R. 3). The verdict found him "guilty of the crime in said indictment contained" (R. 51). The judgment and commitment show that the defendant was "convicted on verdict of guilty of the offense charged in the indictment in the above entitled cause, to-wit, Theft of Government property" (R. 52). It is conceded by the Circuit Court of Appeals as shown by the majority opinion, that the word stealing as denounced in the statute requires proof of felonious intent to sustain conviction (R. 67). The case of *Crabb* v. *Zerbst*, 99 F. 2d 562, 565 (C. A. 5) is authority that the word steal as used in this statute is used to denote a dishonest transaction and requires proof of felonious intent as an element of the crime denounced.

In the case of *Statler* v. *United States*, 157 U. S. page 277, Mr. Justice White, speaking for the court, said:

"Indeed, it is settled beyond question that a verdict of guilty, without specifying any offense, is general,

and is sufficient, and is to be understood as referring to the offense charged in the indictment. St. Clair v. United States, 154 U. S. 154 (38:934); Bond v. People, 39 Ill. 26; State v. Jurche, 17 La. Ann. 71; State v. Curtis, 28 N. C. 247; State v. Tuller, 34 Conn. 280; State v. Morris, 104 N. C. 837."

And the court quoted from Bishop on Criminal Procedure, page 623, Section 1005a, as follows:

"So, likewise, a general finding of 'guilty' will be interpreted as guilty of all that the indictment well alleges."

In the case of *Stromberg* v. *California*, 283 U.S. 359, 75 L. Ed., 1117, Mr. Chief Justice Hughes delivered the opinion of the Court. He said:

"The verdict against the appellant was a general one. It did not specify the ground upon which it rested. As there were three purposes set forth in the statute, and the jury was instructed that their verdict might be given with respect to any one of them, independently considered, it is impossible to say under which clause of the statute the conviction was obtained. If any one of these clauses, which the state has held to be separable, was invalid, it cannot be determined upon this record that the appellant was not convicted under that clause. It may be added that this is far from being a merely academic proposition, as it appears, upon an examination of the original record filed with this court, that the state's attorney upon the trial emphatically urged upon the jury that they could convict the appellant under the first clause alone, without regard to the other clauses. It follows that instead of its being permissible to hold, with the state court, that the verdict could be sustained if any one of the clauses of the statute were found to be valid, the necessary conclusion from the manner in which the case was sent to the jury is that, if any of the

clauses in question is invalid under the Federal Constitution, the conviction cannot be upheld."

**2. The Instructions on Abandonment Should Have Been Given to the Jury by the Trial Court.**

*Brown On Personal Property*, page 9, states:

> "The question whether there is an abandonment or not, thus turns on the fact of intent to be determined by the jury in the light of all the circumstances."

*Log-Owners' Booming Co.* v. *Hubbell*, 135 Michigan. Page 69, states in regard to abandonment.

> "This may be inferred from the conduct of the owners and the situation of the property. If these logs were so situated that there was no danger of injury by decay or otherwise, and the owners had from time to time taken logs therefrom, as they annually drove the river, the intent to abandon could hardly be presumed from lapse of time."

In the case of *Jordan* v. *State*, 107 Tex. C. R. 414, 296 S. W. 585 is one in which the facts are very similar to the case at bar. The respondent in that case was charged with larceny of parts from an automobile that had remained on the side of the road for about a month and had been previously stripped of casings and other parts, including the cylinder head and thinking that the car was junk the respondent removed the radiator, generator and self starter and took them home in the daytime. He said he had no intention of stealing them and believed that the car had been thrown away. He later tried to sell the parts. Defendant's conviction was first affirmed by the Supreme Court of Texas and on a motion for rehearing the court said:

> "We have reached the conclusion that we were in error in holding that the facts do not raise the issue requiring the submission of the requested charge."

The dissenting opinion in this case on the part of the Honorable Thomas M. McAllister, Circuit Judge, and the cases therein cited in support of it are 90, 91 and 92, show that the issue of abandonment should have been submitted to the jury. The Trial Judge and the majority opinion in this case state that there is no evidence of abandonment, that the old bomb casings taken by the defendant, the location of the old bomb casings twenty-four miles away from the headquarters of the bomb base (R. 6) in the deep woods, just general deer country (R. 13) the fact that the old bomb casings had been lying out there for perhaps fifteen years and at least four or five years (R. 7) (R. 13) that they were all rusted out and in the process of decomposition (R. 14) together with the fact that the defendant did not know that the old bomb casings were not to be removed from where they were (R. 23) and the fact that this junk was rotting and rusted right out so the Defendant thought it had been abandoned (R. 35), is evidence for the jury as to whether or not the old bomb casings taken by the defendant were, in fact, abandoned and to his belief that they had been abandoned.

**3. The instruction to the effect that the taking was open and notorious, showing an absence of felonious intent should have been given.**

This instruction was taken from 5 Reid's Branson Instructions to juries p. 133, Sec. 3365 (2).

32 American Jurisdprudence, at page 1049, states:

> "As a general rule, however, where there is some evidence that the taking was under claim of right on the part of the accused, evidence that the property was taken openly, without any concealment or subsequent effort to conceal the taking, is evidence of good faith in the claim of right thereto and is frequently stated by the courts to be strong evidence or very powerful evi-

dence thereof. Some courts declare that where property is taken openly, and there is no subsequent attempt to conceal it, and no denial, but an avowal of the taking, a strong presumption arises that there was no felonious intent, and this presumption must be repelled by clear and convincing evidence before a conviction for larceny is authorized."

**4. The trial court committed error by directing a verdict of guilty and if his charge is not a directed verdict of guilty, it is so argumentative and biased as to constitute reversible error and the proceedings in the trial of this case so far departs from the accepted and usual course of judicial proceedings as to deny the defendant a trial by jury and due process of law as guaranteed to him under the United States Constitution.**

The trial judge directed a verdict of guilty in this case (R. 47) (R. 48) and (R. 49). In the case of *United States* v. *Murdock*, 290 U. S. 389-398, 78 L. Ed. 381, Mr. Justice Roberts speaking for the court said:

"In the circumstances we think the trial judge erred in stating the opinion that the respondent was guilty beyond a reasonable doubt. A federal judge may analyze the evidence, comment upon it, and express his views with regard to the testimony of witnesses. He may advise the jury in respect of the facts, but the decision of issues of fact must be fairly left to the jury, Patton v. United States, 281 U. S. 276, 288, 74 L. Ed. 854, 858, 50 S. Ct. 253; 70 A.L.R. 263; Quercia v. United States, 289 U. S. 466, 77 L. Ed. 1321, 53 S. Ct. 698. Although the power of the judge to express an opinion as to the guilt of the defendant exists, it should be exercised cautiously and only in exceptional cases. Such an expression of opinion was held not to warrant a reversal where upon the undisputed and admitted facts the defendant's voluntary conduct amounted to the commission of the crime defined by the statute. Horning v. District of Columbia, 254 U. S. 135, 65 L.

> Ed. 185, 41 S. Ct. 53. The present, however, is not such a case, unless the word 'willfully,' used in the sections upon which the indictment was founded, means no more than voluntarily."

From the beginning of the trial before the District Judge the theory of the defendant was put forth. This continued all through the trial. On many occasions authorities were shown the court in support of defendant's theory. The record shows that trial began on June 13, 1949, (R. 4) and that the jury retired at 1:46 p.m. on June 14, 1949, that defendant's attorney was given fifteen minutes to argue the case to the jury (R. 41) and was not permitted to argue their defense to the jury (R. 42) where the trial court said:

> "I am not going to permit you to argue to this jury that this man can go on somebody else's property, take property, and then go away and say, 'I thought they abandoned it.'"

The court would not permit argument on the point at the end of the case and before it was submitted to the jury (R. 45).

In the case of *People* v. *Lee*, 258 Michigan Reports, page 621, the following language is found:

> "While this court has always conceded to a trial court a liberal discretion in the control and direction of statements and arguments of counsel to the jury, it has as strongly upheld the right of counsel to state their theory of the law as applicable to the facts which they expect to prove."

The denial by the trial court of the right to argue to the jury defendant's theory and only defense, that he thought the property was abandoned and that he had no intention to steal was in effect denial to the defendant of a trial by jury and was, when taken together with the Court's charge

directing the verdict of guilty, a denial of a trial by jury and due process of law guaranteed by the United States Constitution.

## Conclusion

The following from St. Matthew, 15: 19, 20 is in point:

> "For out of the heart proceed evil thoughts, murders, adulteries, fornications, thefts, false witness, blasphemies:
> These are the things which defile a man: but to eat with unwashen hands defileth not a man."

Respectfully submitted,

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Dated: September 20, 1951.